

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
The Library of Congress

*In re*

Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and “Preexisting”  
Subscription Services (SDARS III)

Docket No. 16–CRB–0001–SR/PSSR (2018–  
2022) (Remand)

**DECLARATION OF MARGARET L. WHEELER-FROTHINGHAM**

1. I am an attorney at Mayer Brown LLP, and am counsel for Music Choice in the above-captioned remand proceeding. I submit this declaration in support of Music Choice’s Reply In Support of its Motion to Compel. I am fully familiar with the facts set forth in this declaration, and if called upon to testify could do so truthfully and competently.

2. In its written Responses to Music Choice’s Requests for Production, SoundExchange did not object, beyond its boilerplate written objections, to the production of documents at issue in this motion. Annexed as Exhibit A to this Declaration is a true and correct copy of SoundExchange’s Responses and Objections.

3. During the meet and confer process, both by phone and in writing, SoundExchange confirmed that it would not limit its actual production based upon boilerplate written objections, other than on privilege grounds. Even after Music Choice determined that responsive documents might have been withheld and raised the issue, SoundExchange did not describe any withheld documents. It merely confirmed that some documents (without further


description) were withheld on privilege grounds. Annexed as Exhibit B to this Declaration is a true and correct copy of email meet and confer correspondence with counsel for SoundExchange.

4. At no time during the meet and confer process related to document discovery did SoundExchange indicate that it viewed March 31 as the deadline to move to compel. To the contrary, the meet and confer process regarding Music Choice's own document responses and production continued into April and SoundExchange never indicated that it believed it would need final positions prior to the March 31 production deadline. *See* Exhibit B.

5. I have reviewed SoundExchange's document production in this remand proceeding. Of the 67 documents SoundExchange has produced, over 30 comprise a series of duplicative email chains, letters, and redlines relating to either 1) the NDA between Eisner Amper (Mr. Stark's firm before he moved his practice to Prager Metis) for a proposed audit of Music Choice's PSS and BES license payments (not specific to Mr. Stark's investigation into BDO's defensive audit of the PSS); 2) correspondence between SoundExchange and Music Choice setting out the parties' respective position on the availability or use of defensive audits generally; or 3) to correspondence in which Music Choice agreed to provide BDO's audit reports to Mr. Stark. None of these documents contain any substantive discussion of Mr. Stark's analysis or evaluation of the BDO audits. These documents were all created before Mr. Stark began his review of the BDO materials. SoundExchange has not produced any documents from after the commencement of Mr. Stark's investigation that relate to the substance of that investigation at all, or any documents containing any findings, evaluations, or analysis related to the BDO audits.

6. Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: May 17, 2021  
New York, New York



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*Counsel for Music Choice*

# Exhibit A

**Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Washington, D.C.**

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In the Matter of:

Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and “Preexisting” Subscription  
Services (SDARS III)

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) Docket No. 16-CRB-0001 SR/PSSR  
) (2018-2022) (Remand)  
)  
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**SOUNDEXCHANGE, INC.’S RESPONSES AND OBJECTIONS TO MUSIC CHOICE’S  
REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to the Copyright Royalty Judges’ Order Regarding Proceedings on Remand, dated December 1, 2020, SoundExchange, Inc. (“SoundExchange”), by its attorneys, hereby responds and objects to Music Choice’s Requests for Production of Documents (“the Requests”).

**GENERAL OBJECTIONS**

1. SoundExchange objects that the Requests seek production of documents that are not relevant to this remand proceeding and not proportional to the needs of the case. Discovery from SoundExchange is not necessary to resolve the remaining issues on remand, as articulated by the Copyright Royalty Judges and the U.S. Court of Appeals for the D.C. Circuit. *Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 427–28 (D.C. Cir. 2020) (“On remand, the Board must determine the precise scope of Music Choice’s service offering as it actually existed on July 31, 1998. . . . [and] determine which parts of Music Choice’s current service offering are eligible for the grandfathered rate because they were a part of Music Choice’s service on July 31, 1998.”); *id.* at 430 (“We remand for the Board to determine, in accordance with this opinion, whether Music Choice’s internet transmissions qualify for the grandfathered rate and to reconsider the audit definition and provide a reasoned explanation if the Board determines the revised definition is

justified.”); *see also* December 1, 2020 Order Regarding Proceedings on Remand (CRJs stating “the scope of remand proceedings is limited to the issues of the extent to which Music Choice’s Internet transmissions are covered by the PSS license and the effect of so-called ‘defensive audits’”).

2. SoundExchange objects to the Requests to the extent they purport to impose requirements that exceed or are inconsistent with 17 U.S.C. § 803(b), 37 C.F.R. § 351.5, or any other applicable rule or order governing this proceeding.

3. SoundExchange objects to the Requests to the extent they include “broad, nonspecific discovery request[s]” disallowed by 37 C.F.R. § 351.5(b).

4. SoundExchange objects to the Requests to the extent they are ambiguous, duplicative, and/or vague.

5. SoundExchange objects to the Requests to the extent that they are duplicative, oppressive, harassing, overbroad, cumulative, and/or unduly burdensome; would needlessly increase the cost of this litigation; or would require SoundExchange to spend an unreasonable amount of time, effort, and resources in order to respond.

6. SoundExchange objects to the Requests to the extent they seek information or documents protected from discovery under any statute, regulation, agreement, protective order or privilege, including, but not limited to, the attorney-client privilege and work-product immunity doctrine. Any inadvertent disclosure of such information shall not be deemed a waiver of the attorney-client privilege, the attorney work-product immunity doctrine, and any other applicable privilege or doctrine.

7. SoundExchange objects to the extent that the Requests purport to require disclosure of confidential information or documents that SoundExchange is prohibited by regulation from disclosing. *See, e.g.*, 37 C.F.R. § 382.6.

8. SoundExchange objects to the Requests to the extent they call for information that is already in Music Choice’s possession, custody, or control; that is publicly available; or, that is readily accessible from some other source.

9. SoundExchange objects to the Requests to the extent they seek documents that are not in the possession, custody, or control of SoundExchange, including documents from members of SoundExchange, the RIAA, and other third parties.

10. SoundExchange objects to the terms “any,” “all” and “each” with respect to certain of the Requests. All responses and objections reflect the current status of SoundExchange’s knowledge, understanding, and belief. By responding or producing documents, SoundExchange does not certify that “any,” “all” or “each” responsive document, communication, or information has been obtained.

11. SoundExchange objects to the definitions of “communication,” “document” and “documents” to the extent these terms purport to impose obligations beyond the scope of the applicable statute, regulations, rules, agreements or orders governing this proceeding.

12. SoundExchange objects to the definition of “Defensive Audit Provision,” which references 37 C.F.R. § 382.87(d)—a provision that does not exist and hence has no “predecessor regulatory sections.” Unless otherwise noted, SoundExchange will interpret “Defensive Audit Provision” as synonymous with the “Acceptable Procedure Provision” as that term is defined in SoundExchange Inc.’s First Request for Production of Documents.

13. SoundExchange objects to the definitions of “Music Choice PSS” and “Music Choice’s PSS Internet Transmissions,” and the use of the term “Music Choice’ PSS subscribers” insofar as these terms express or imply legal conclusions about the scope of Music Choice’s services or transmissions, or the extent to which any Music Choice service offering should be considered a PSS. By responding or producing documents, SoundExchange does not concede that any Music Choice service offering is a PSS.

14. SoundExchange objects to the definition of “SoundExchange,” “you,” “your,” and “yours” as vague, oppressive, harassing, overbroad, unduly burdensome, irrelevant, and not proportional to the needs of the case. This definition purports to impose on SoundExchange an obligation to collect documents from an unreasonably wide array of people and entities, including anyone “acting on [SoundExchange’s] behalf or whose interests are represented by SoundExchange, Inc. in connection with the collection and distribution of royalty payments for the use of sound recordings.” Tens of thousands of people and entities might fit this description, and the request to produce documents in their possession is egregiously overbroad. SoundExchange further objects that this instruction purports to require SoundExchange to search for and collect documents that are not in its possession, custody, or control.

15. Many of the Requests do not state a specific timeframe. SoundExchange will identify a reasonable timeframe, where appropriate, in its responses to specific requests.

16. SoundExchange objects to the Requests to the extent they seek documents that do not exist, no longer exist, or are not maintained in the ordinary course of business. SoundExchange further objects to the Requests to the extent they purport to require the creation of documents or the compilation of documents in a manner different from the manner in which they are maintained in the ordinary course of business.



17. Although the Requests acknowledge that the participants have not yet agreed and the Copyright Royalty Judges have not yet ordered an ESI protocol in this remand proceeding, Music Choice appears to presuppose the requirements of any such agreement or order. SoundExchange objects to the extent that Music Choice seeks to impose requirements (such as the production of metadata and collection of certain electronic communications) that are not in an ESI protocol or that are not consistent with any ESI protocol to be ordered or agreed in connection with this proceeding.

18. Statements and omissions in SoundExchange's responses and objections, including any statement that SoundExchange will produce documents responsive to a Request, do not indicate and should not be construed as meaning that SoundExchange agrees, admits, or otherwise acknowledges the characterization of fact or law or the expressions or assumptions contained in the Request, that the scope of the Request is consistent with the discovery permitted in this proceeding, or that the documents are relevant and admissible.

19. SoundExchange reserves any and all objections to the use or admissibility in any proceeding of any information, material, documents, or communications identified, produced or disclosed in response to the Requests.

20. The responses and objections contained herein are made to the best of SoundExchange's present knowledge, belief, and information, and are based on a reasonable, diligent, and ongoing search. Without in any way undertaking an obligation to do so, SoundExchange reserves the right to amend or supplement its objections and responses based on its continuing investigation of this matter, further review, or later acquisition of responsive information.

## **SPECIFIC RESPONSES & OBJECTIONS**

SoundExchange incorporates its General Objections into each of the responses below, and sets forth the following specific objections and responses:

**1. All Documents concerning whether to seek, in any royalty rate proceeding or through any other mechanism, a different royalty rate for Music Choice's PSS Internet Transmissions than for non-internet transmissions by a PSS Service.**

**RESPONSE:** SoundExchange objects to this request as overbroad, unduly burdensome, oppressive, harassing and not reasonably limited to the issues in this proceeding, including because the request seeks "all" documents from "any" rate-setting proceeding or through "any other mechanism." SoundExchange further objects that the use of the terms "any other mechanism" and "a PSS Service" are vague and confusing. SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, or any other applicable privilege or doctrine.

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**2. All Communications concerning Music Choice's PSS Internet Transmissions.**

**RESPONSE:** SoundExchange objects to this request as overbroad, unduly burdensome, oppressive, harassing and not reasonably limited to the issues in this proceeding. This request provides no reasonable limit on the parties from whom "all" communications are requested; nor is it reasonably limited to communications concerning the issues in this proceeding. SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, or any other applicable privilege or doctrine.

Subject to and without waiver of its general and specific objections, SoundExchange is willing to meet and confer and consider producing documents responsive to a reasonably narrowed version of this request.

**3. Documents sufficient to show when SoundExchange first became aware of Music Choice's PSS Internet Transmissions.**

**RESPONSE:** SoundExchange objects that this request, which purports to require it to inquire into the state of mind of each of its individual employees and agents throughout time, is overbroad, unduly burdensome, oppressive, harassing, not reasonably limited to the issues in this proceeding—and, ultimately, futile. This request is also unnecessarily cumulative; to the extent that any documents showing SoundExchange's awareness of Music Choice's internet transmissions, such documents would be responsive to (and duplicative of) several other requests.

In light of its general and specific objections, SoundExchange will not conduct a separate search for documents responsive to this request.

**4. All Documents supporting Your contention that Music Choice was not making Music Choice's PSS Internet Transmissions prior to 1998, if You so contend.**

**RESPONSE:** SoundExchange objects that this request seeks information that is within Music Choice's possession, custody, or control. SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and any other applicable privilege or doctrine. Discovery and development of litigation positions in this matter are ongoing. SoundExchange's agreement to search for and produce documents responsive to this request is without waiver of SoundExchange's right to rely on documents outside of the possession, custody, and control of SoundExchange, including those produced by Music Choice in this proceeding.

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**5. All Documents concerning any correspondence between Music Choice and either SoundExchange or its predecessor RIAA regarding Music Choice's PSS Internet Transmissions.**

**RESPONSE:** SoundExchange objects to this request to the extent it is duplicative of Request No. 2. SoundExchange also objects to this request as seeking information that is within Music Choice's possession, custody, or control. By providing a response to this request, SoundExchange does not indicate agreement with Music Choice's characterization of the relationship between SoundExchange and RIAA. SoundExchange objects to the request to the extent it seeks documents that no longer exist or that are not in its possession, custody, or control, including documents possessed by RIAA.

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**6. All Documents analyzing, comparing, and/or contrasting Music Choice's PSS Internet Transmissions, or any aspect or feature of those Transmissions, with non-internet transmissions made by the Music Choice PSS.**

**RESPONSE:** SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and any other applicable privilege or doctrine. SoundExchange objects to the terms "any aspect or feature" as vague. Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**7. All Documents concerning the eligibility of Music Choice's PSS Internet Transmissions for the statutory royalty rate applicable to PSS Services.**

**RESPONSE:** SoundExchange objects to this request as overbroad, unduly burdensome, oppressive, harassing and not reasonably limited to the issues in this proceeding, among other reasons because it seeks "all" responsive documents. SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and any other applicable privilege or doctrine. SoundExchange objects to the use of the phrase "*the* statutory royalty rate applicable to PSS Services" insofar as it implies the Copyright Royalty Judges can set only one royalty rate applicable to all types of PSS transmissions or services. By responding or producing documents, SoundExchange does not concede that Music Choice's PSS Internet Transmissions should be paid for at any particular statutory royalty rate.

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**8. All Documents regarding the eligibility of Music Choice's PSS Internet Transmissions for the statutory license terms applicable to PSS Services.**

**RESPONSE:** SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and any other applicable privilege or doctrine. SoundExchange objects to the use of the phrase "*the* statutory license terms applicable to PSS Services" insofar as it implies the Copyright Royalty Judges can set only one set of terms applicable to all types of PSS transmissions or services. By responding or producing documents, SoundExchange does not concede that Music Choice's PSS Internet Transmissions should be subject to any particular statutory license terms.

Subject to and without waiver of SoundExchange's general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**9. All Documents upon which You intend to rely to support your position regarding the appropriate statutory license classification for PSS Internet Transmissions.**

**RESPONSE:** SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and any other applicable privilege or doctrine. Discovery and development of litigation positions in this matter are ongoing. SoundExchange's agreement to search for and produce documents responsive to this request is without waiver of SoundExchange's right to rely on documents outside of the possession, custody, and control of SoundExchange, including those produced by Music Choice in this proceeding. SoundExchange objects to this request because its use of the term "appropriate statutory license classification" is vague and confusing.

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**10. All Documents upon which You intend to rely to support your position regarding the appropriate royalty rate for PSS Internet Transmissions.**

**RESPONSE:** SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and any other applicable privilege or doctrine. Discovery and development of litigation positions in this matter are ongoing. SoundExchange's agreement to search for and produce documents responsive to this request is without waiver of SoundExchange's right to rely on documents outside of the possession, custody, and control of SoundExchange, including those

produced by Music Choice in this proceeding. SoundExchange further objects to this request to the extent it is duplicative of RFP 9.

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**11. All Documents upon which You intend to rely to support your position regarding the appropriate license terms for PSS Internet Transmissions.**

**RESPONSE:** SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and any other applicable privilege or doctrine. Discovery and development of litigation positions in this matter are ongoing. SoundExchange's agreement to search for and produce documents responsive to this request is without waiver of SoundExchange's right to rely on documents outside of the possession, custody, and control of SoundExchange, including those produced by Music Choice in this proceeding. SoundExchange objects to this requests to the extent it is duplicative of RFP 9.

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**12. All Documents concerning any harm or burden SoundExchange contends it has suffered as a result of any PSS licensee's use of the Defensive Audit Provision at any time.**

**RESPONSE:** SoundExchange objects to this request as overbroad, unduly burdensome, and not reasonably limited to the issues in this proceeding. SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and any other applicable privilege or doctrine.

Discovery and development of litigation positions in this matter are ongoing. SoundExchange's agreement to search for and produce documents responsive to this request is without waiver of SoundExchange's right to rely on documents outside of the possession, custody, and control of SoundExchange, including those produced by Music Choice in this proceeding.

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**13. All Documents upon which You intend to rely to support your proposed addition of the qualifying language "with respect to the information that is within the scope of the audit" to the Defensive Audit Provision.**

**RESPONSE:** SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and any other applicable privilege or doctrine. Discovery and development of litigation positions in this matter are ongoing. SoundExchange's agreement to search for and produce documents responsive to this request is without waiver of SoundExchange's right to rely on documents outside of the possession, custody, and control of SoundExchange, including those produced by Music Choice in this proceeding. SoundExchange objects to this requests to the extent it is duplicative of RFP 12.

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**14. All other Documents upon which you intend to rely in this proceeding.**

**RESPONSE:** SoundExchange objects to this request as overbroad, unduly burdensome, oppressive, harassing and not reasonably limited to the issues in this proceeding, among other



reasons because it seeks “all” responsive documents. SoundExchange objects to the request to the extent it seeks information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and any other applicable privilege or doctrine. Discovery and development of litigation positions in this matter are ongoing. SoundExchange’s agreement to search for and produce documents responsive to this request is without waiver of SoundExchange’s right to rely on documents outside of the possession, custody, and control of SoundExchange, including those produced by Music Choice in this proceeding. SoundExchange objects to this requests to the extent it is duplicative of RFPs 10, 11, 12, and 13.

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that can be located after a reasonable and diligent search.

**15. All Documents considered or relied upon in preparing any portion of any of SoundExchange’s written submissions to or testimony given before the Copyright Royalty Board in this remand proceeding. To the extent any Document becomes responsive to this request after the close of discovery, such Document(s) must be promptly produced at that time.**

**RESPONSE:** SoundExchange objects to this request as overbroad, unduly burdensome, oppressive, and harassing. SoundExchange objects to the request as seeking information or documents protected from discovery by the attorney-client privilege, work-product immunity doctrine, and other applicable privileges or doctrines. SoundExchange objects to this requests to the extent it is duplicative of RFPs 10, 11, 12, 13, and 14. SoundExchange’s agreement to search for and produce documents responsive to this request is without waiver of SoundExchange’s right to rely on documents outside of the possession, custody, and control of SoundExchange, including those produced by Music Choice in this proceeding. SoundExchange objects to this request because its use of the term “considered” is vague and confusing. SoundExchange objects to

producing documents that it “considered” as a “broad, nonspecific discovery request” disallowed by 37 C.F.R. § 351.5(b)(1).

Subject to and without waiver of its general and specific objections, SoundExchange will produce responsive, non-privileged documents (if any) that were “relied upon” and can be located after a reasonable and diligent search.

Dated: February 17, 2021

Respectfully submitted,

/s/ Emily L. Chapuis

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*Counsel for Plaintiff SoundExchange, Inc.*

## **CERTIFICATE OF SERVICE**

I hereby certify that on February 17, 2021 I caused a true and correct copy of the foregoing Responses and Objections to Music Choice's Requests for Production to be served on all counsel of record via email.

/s/Emily L. Chapuis  
Emily L. Chapuis

# Exhibit B

**From:** Wheeler-Frothingham, Margaret  
**Sent:** Monday, April 5, 2021 5:36 PM  
**To:** Cherry, Andrew B.; Fakler, Paul  
**Cc:** Chapuis, Emily L.  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

Andrew,

I write in response to your emails regarding our meet and confer calls. Our responses to the issues highlighted in your emails, or clarifications to the memorialization of our calls, are below:

**I. Time Frame:**

Music Choice agrees not to limit (and has not limited) the timeframe for the audit-related documents it has agreed to produce. But while the temporal scope of these documents is not limited to 1996-1998 and 2018-present, the nature of the documents Music Choice has agreed to produce (e.g., final audit reports and audit engagement letters), remains unchanged.

With respect to non-audit related documents, Music Choice has only agreed to search for and produce documents from the time periods 1996 – 1998 and 2018 to the present. However, with respect to affiliate agreements, amendments and related documents, Music Choice's search and production includes any agreements and amendments that were in effect during those time periods – and so the produced affiliate agreements also cover much of the interim time periods, as these affiliate agreements are often long-term agreements.

SoundExchange still has not explained how information regarding changes to the internet-related parts of the Music Choice consumer-facing service during the intervening time period 1999-2017 could be relevant to the issues on remand. And Music Choice is under no obligation to search for or produce documents that are not relevant to the limited scope of the remand. This is not only a burden issue – it is first and foremost a relevance issue. However, to the extent Music Choice has found documents from that interim time period that include any substantive information about the internet transmissions as they actually existed in 1998 or before, Music Choice has not withheld those documents based on its time frame objection, because it recognizes that such documents would be relevant. With respect to SoundExchange's proposal to limit the scope of documents during the irrelevant interim time period to those related to the introduction of "major features," Music Choice notes that this would not significantly lessen the burden of the request. There is no practical way to limit a search to capture only documents related to "major features" (even if that term had a clear meaning in this context, which it does not). Thus, responding to this request would still require the manual review of a large volume of documents to determine whether any references to internet features were "major" or not, or if the applicable keywords actually related to the service at issue in the remand.

**II. Communication RFPS:**

You have proposed a narrowed scope of requests for certain categories of communications. As explained for each category below, the proposed scope is not acceptable to Music Choice.

**- Communications regarding the eligibility of Music Choice's PSS Internet Service for the grandfathered PSS rate**

Music Choice stands on its objection to producing communications regarding the eligibility of Music Choice's PSS Internet Service for the grandfathered PSS rate. First, such communications – if they existed- would inherently be communications about a legal issue, and thus most likely would be privileged. Second, even if such communications were not privileged, they would not be relevant. There is no "willfulness" or other intent component to the factual questions the Judges must evaluate on remand. The relevant factual determinations are what Music Choice was *actually doing via internet in 1998*

and what they are doing in the current rate period. If, hypothetically, there existed an internal e-mail or memorandum between Music Choice employees stating their belief that the internet transmissions fell within the scope of the PSS license, or if there were an email with an employee's opinion that the internet transmissions fell outside the scope, neither would be relevant to the legal determination of whether those transmissions were eligible for the license. Only facts about the actual service offering itself would be relevant. Put differently, the Judges must make their determination based on what Music Choice was in fact doing – not how its employees assessed what it was doing – in 1998 and today. And so the lack of relevance alone renders this request objectionable. But even if SoundExchange were able to provide some argument (which it has not) that these documents are tangentially relevant to the evaluation of the questions on remand, the facts that 1) this requests seeks communications spanning 26 years, and 2) any responsive documents would almost certainly be privileged, render the request inappropriate. To be clear, Music Choice has agreed to produce (and now has produced) a large number of more formal documents, such as its board presentations, that reference the nature of its internet transmissions in the 1996-1998 period. Music Choice will not also search for communications about legal opinions that would not contain relevant information and would likely contain privileged information.

- **Communications Regarding Music Choice's PSS Internet Service as it existed in 1998**

Music Choice has produced numerous documents, such as board presentations, minutes, and business plans, to the extent those documents discuss Music Choice's internet transmissions as they existed in 1998. Searching for any internal communications (which would, by nature, be from 25 years ago) that *might* reference those transmissions or features of the service would be looking for a needle in a haystack, and would be inherently burdensome. And that search would be unlikely to provide any *additional* relevant evidence beyond what is already memorialized in the more formal documents we have produced. Any such search would be especially unlikely to result in the discovery of any relevant, non-duplicative information because our client no longer has its emails from the 1996-1998 period. And non-privileged communications by the Music Choice business *about* the 1996-1998 period are not likely to have been generated in recent years. Music Choice will stand on its objections that a search for these documents would be unduly burdensome in proportion to the relevant information that might be discovered – which is likely to be duplicative, if it exists at all – and in light of the fact that any such documents from recent times that do exist are likely privileged.

- **Communications Music Choice's development and expansion of its Internet service**

As stated above, any development or expansion of the internet based offerings during the period 1998 through 2018 are not relevant to the determination the Judges have been instructed to undertake: what Music Choice's internet transmissions were like in 1998, and what they are like in the rate period at issue. For the periods relevant to this remand, Music Choice has already produced its board presentations, business planning documents, screenshots of its service over the relevant periods of time, marketing presentations, and other formal documents describing or showing changes to its service. Significant new features of and other changes to Music Choice's services are typically discussed in these types of documents. They are not typically discussed, other than tangentially, in e-mails and other communications. The additional search for and review of communications that are likely to provide at best a handful of tangential references to the same features discussed in the more formal documents already produced, would not be likely to result in the production of additional relevant information. And such a search would be very burdensome for the period 2018 through the present. Given the nature of email communication in this day and age, emails happening to mention "internet" would need to be manually reviewed to determine whether they contain responsive information related to any actual features at issue in this remand, and the search and review for such documents would thus be extremely burdensome. And such an effort would not be likely to provide useful information beyond that already provided in the more formal documents Music Choice has produced. Music Choice will stand on its objections.

**III. SoundExchange's RFPs:**

On our March 19 call, we discussed several of SoundExchange's specific requests. Below I have clarified some points in your memorialization of that discussion.

- **RFPs 5 and 6 (Features of Internet Service)**

- o Music Choice has objected that producing *all* documents in response to these requests would be unduly burdensome and disproportionate to the needs of the case, and has stated that it will instead produce

representative documents sufficient to show the information sought. You have asked for a written follow-up explaining why producing all documents responsive to Requests 5 and 6 would be too burdensome.

As I have explained on our meet and confer calls, and in our written objections, a search for *all* documents, of any kind, in any way related to the internet offerings, marketing materials, or press releases – all from 25 years ago – is *inherently* burdensome. As I have previously explained to you, the search for those documents would require re-opening the currently closed Music Choice office and having employees go into that office during a still-ongoing pandemic to search (again) through boxes of decades old documents to identify each one that touches upon the subject matter in some way. And SoundExchange has not explained how the request for *all* documents is likely to increase the production of non-duplicative relevant information as compared to the production of representative documents or documents sufficient to show the information sought. That said, as a compromise, Music Choice agrees to produce (and has produced) any actual marketing materials or press releases for the internet service offered during the 1996 – 1998 timeframe, to the extent it was able to locate any such documents through a reasonable search.

Regarding documents that Music Choice has agreed to produce showing what its internet service was like in 1998, you have asked us to confirm in writing what this category of documents includes and what it excludes. This category of documents includes formal documents such as board presentations, minutes, screen design documents (including advertising, internal marketing documents, screenshots, and the like), and other internal strategy documents or partner-facing documents that substantively describe any aspect of the internet service as offered in 1996 - 1998. As noted above this includes any marketing presentation materials or press releases related to the internet offering, to the extent these documents still exist and could be located by a reasonable search. With respect to detailed, back-end engineering documents, SoundExchange has not explained how these documents would be likely to provide relevant information.

- **RFP 13 (PSS Eligibility)**

- o You have asked us to confirm that any documents responsive to this request are either privileged or already in SoundExchange's possession, custody, and control. As we have previously noted, eligibility for the PSS license is a legal question. And, again, it is inherently unlikely that Music Choice would have a non-privileged communication on a legal topic of that nature. More important, if any Music Choice employees *did* have, e.g., communications providing their personal opinions on that legal question, those would not be relevant – nor has SoundExchange explained how Music Choice's employees' opinion on that legal question could be relevant. To the extent you refer to third-party communications which we have identified to be in your possession, we refer you to the correspondence with RIAA regarding Music Choice's internet transmissions, produced and used at trial.

- **RFP 14 (Allocation of Costs and Revenues Among Service Types):**

- o Regarding SoundExchange RFP 14, which seeks "[d]ocuments sufficient to show and substantiate Music Choice's allocation of costs and revenues between lines of business and different types of service offerings," you have clarified that this RFP seeks information regarding Music Choice's noninteractive audio-only subscription transmissions only, with costs and revenues broken down by type of transmissions (e.g. internet or non-internet based) and distributor. Music Choice does not agree to produce documents responsive to this RFP, even as clarified. First, even this slightly more narrow subset of information is irrelevant to the question of Music Choice's internet transmissions' eligibility for the PSS license rate and terms. Second, as the affiliate agreements Music Choice has produced show (and as Music Choice has stated repeatedly throughout the underlying proceeding, referral briefing, and on appeal), there are no separate payments for the internet transmissions, so Music Choice does not separately track revenue or costs for the internet transmission in its financial statements. SoundExchange can verify this by looking at the years of financial documents Music Choice has already produced in this proceeding.

- **RFPs 15 and 16 (Audit Documents):**

- o Music Choice has taken the position that it will only produce final audit reports and audit engagement letters. This limitation is not acceptable to SoundExchange. SoundExchange argues that it is entitled to any audit-related documents that reflect the scope and conduct of the auditors, including all documents from its defensive audits that Music Choice or its auditors provided to the independent auditors engaged by SoundExchange.

Music Choice believes that the documents it has agreed to produce – and has produced – are sufficient to show the scope and conduct of the auditors, and that production of, e.g., auditor work papers is not called for. Without agreeing that the scope and methodology employed in specific historical audits are relevant to the narrow scope of this remand, Music Choice confirms that the scope and methodologies for these audits are clearly set out in the audit reports themselves – which Music Choice has produced. The engagement letters with the auditors, which letters Music Choice has also produced, provide additional detail on these issues. But this proceeding is not an audit. Any of the additional detailed information SoundExchange seeks is even less relevant to the only audit-related question on remand: whether the defensive audit provision in the PSS license terms should be changed. Music Choice believes that it is totally inappropriate for SoundExchange to try to use this remand discovery to engage effectively in a meta-audit, including for periods that have already long closed and new periods for which an audit has already been noticed. And while you represented by phone that a meta-audit was not SoundExchange's intent, given the irrelevance of this information to the current remand, that is certainly the effect of these requests.

Even if SoundExchange believed that Music Choice's audits have not satisfied the regulatory requirements for a defensive audit (a proposition Music Choice would emphatically reject), a rate proceeding is not the appropriate forum to resolve such a dispute – nor do the Judges have jurisdiction to resolve that kind of dispute. Music Choice has agreed to produce the audit reports and engagement letter, notwithstanding their irrelevance, as a good faith compromise. But it will not allow SoundExchange to go on a fishing expedition to revisit substantive issues from closed audit periods or to preview substantive issues related to the upcoming audit of Music Choice's PSS, which we understand is scheduled to begin next week.

- **RFP 18 (Direct Licenses)**

- o You have asked us to confirm whether Music Choice will produce all direct licenses for its PSS that were in effect in 1998 (regardless of when the agreement was entered), as well as those that are in effect for the current rate period. Music Choice will stand on its objections to this request. SoundExchange has not explained how any direct licenses would be relevant. Music Choice therefore does not agree to waive its objections. However, we can represent that Music Choice has never entered into any direct licenses (as it understands that term) for its PSS and has only relied on the statutory PSS license for transmissions covered by that license.

- **RFP 19 (Agreements)**

- o For RFP 19, you have asked us to "please provide the same confirmation requested with respect to RFP18." We are confused by your statement. RFP 19 only asks for agreements between Music Choice and its affiliates. Direct licenses have nothing to do with that – and that topic is covered in RFP 18 above.

For clarity, we confirm that we have produced all agreements with Music Choice's affiliates/distributors that relate to Music Choice's consumer-facing non-interactive audio channels – including amendments, extensions, renewals, notices, and the like. To the extent there are any such documents specific to trial programs or program roll-outs for that consumer subscription service, they have been produced.

- **RFP 22 (Financial Analyses)**

- o Regarding documents concerning financial analyses, you propose that if Music Choice will agree to produce documents responsive to SoundExchange's proposed compromises for RFPs 14, 15, and 16, then SoundExchange would accept Music Choice making no further production in response to Request 22.



Music Choice does not so agree. SoundExchange has not explained how the documents enumerated in RFP 22 would be relevant to the inquiry in this remand. They are not. Nor are the documents Music Choice has objected to and refused to produce in response to RFPs 14 – 16. Music Choice will stand on its objection.

Best,

**Margaret L. Wheeler-Frothingham**

*Associate*

*Pronouns: she/her*

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---

**From:** Cherry, Andrew B. <ACherry@jenner.com>

**Sent:** Friday, March 26, 2021 12:29 PM

**To:** Wheeler-Frothingham, Margaret <MWheelerFrothingham@mayerbrown.com>; Fakler, Paul <PFakler@mayerbrown.com>

**Cc:** Chapuis, Emily L. <EChapuis@jenner.com>

**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**\*\*EXTERNAL SENDER\*\***

Hi Margaret,

Thanks for taking the time to talk last week. Please find below a summary of our discussion last week, including the outstanding points of dispute regarding document production:

**Timeframe:** Please confirm that Music Choice is amenable to the following agreement with regard to timeframe:

- For non-audit-related requests, SoundExchange is open to a timeframe limitation that applies equally to both parties.
- **We are open to limiting the parties' respective searches for non-audit-related documents to encompass (1) 1996-2000, (2) 2004-05, and (3) 2018-present.** As you know, there was an exchange of letters regarding Music Choice's internet service in 2004 and 2005; a search for other documents from that time period is necessary to assess the state of Music Choice's service and any changes that may have informed that exchange.
- The foregoing limitation – which is intended to mitigate the burden of document collection and review – is not itself a basis for withholding responsive documents. In other words, if - incident to other search efforts - the parties discover responsive documents outside of the identified date ranges, they agree not withhold such documents on the basis of timeframe alone.
- Neither party will impose a time frame limitation on its searches for audit-related documents.

**Communication RFPs:** The parties discussed possible limitations to each side's broad requests for communications. See SX RFP 2-3, MC RFP 2. As stated in our March 17 email, SoundExchange is open to mutually narrowing these requests to encompass non-privileged communications related to:

- (1) The eligibility or ineligibility of Music Choice's PSS Internet Service for the grandfathered PSS rate;
- (2) Music Choice's PSS Internet Service as it existed in 1998; and
- (3) Music Choice's development and expansion of its Internet service.

**Please confirm that this scope is acceptable to Music Choice.**

**SoundExchange's RFPs:** On our March 19 call, we also discussed several of SoundExchange's specific requests. The following memorializes that discussion as well as outstanding questions from our March 11 call.

- **RFPs 5 and 6 (Features of Internet Service)**

- Music Choice has objected that producing all documents in response to these requests would be unduly burdensome and disproportionate to the needs of the case, and has stated that it will instead produce only a subset of sufficient or representative documents.
  - SoundExchange notes that your objection is particularly puzzling, given that we tailored the requests narrowly and we requested only documents "sufficient to show" for all but a limited subset. SoundExchange requested "all" documents" responsive to 5 (internet service offerings you provided on or before July 31, 1998), 6(b) (marketing materials re your internet service) and 6(c) (press releases re your internet service).)
  - **You committed to providing written follow-up explaining why producing additional documents responsive to Requests 5 and 6 would be too burdensome. Will you please provide us with that information so that we can assess Music Choice's objection?**
- Additionally, you explained that, regardless of the foregoing objection, Music Choice does intend to produce all documents showing what its internet service was like in 1998. **Will you please confirm in writing what this category of documents includes (documents describing consumer-facing features, major technological changes, etc.) and what it excludes?**

- **RFP 13 (PSS Eligibility)**

- **You indicated that it might be the case that any documents responsive to this request are either privileged or already in SoundExchange's possession, custody, and control. Will you please confirm?**

- **RFP 14 (Allocation of Costs and Revenues Among Service Types):**

- Music Choice has to date refused to provide any documents in response to this request, which seeks "[d]ocuments sufficient to show and substantiate Music Choice's allocation of costs and revenues between lines of business and different types of service offerings." While we believe this request is already quite narrow, in that it seeks only documents "sufficient to show," you asked us to clarify in writing what it entails.
- To be clear, RFP 14 seeks information on Music Choice's noninteractive audio-only subscription transmissions only, with costs and revenues broken down by type of transmissions (e.g. internet or non-internet based) and distributor.
- **Please let us know whether Music Choice will produce responsive documents in light of that clarification.**

- **RFPs 15 and 16 (Audit Documents):**

- Music Choice has taken the position that it will only produce final audit reports and audit engagement letters. This limitation is not acceptable to SoundExchange. At a minimum, SoundExchange is entitled to any audit-related documents that reflect the scope and conduct of the auditors, including all documents from its defensive audits that Music Choice or its auditors provided to the independent auditors engaged by SoundExchange. We understand that at the time of the 2016 audit, Music Choice provided its work papers to SoundExchange's auditors, among other documents.
- Music Choice said they would take our position under advisement. **Please let us know if your position on this limitation has changed, or if we are at an impasse with regard to documents beyond engagement letters and final reports.**

- **RFP 18 (Direct Licenses):**

- **Were you able to confirm that Music Choice will produce all direct licenses that were in effect in 1998 (regardless of when the agreement was entered), as well as those that are in effect for the current**

**rate period?** As we discussed, this request is only intended to cover Music Choice's noninteractive audio-only subscription transmissions.

- **RFP 19 (Agreements):**
  - o **Will you please provide the same confirmation requested with respect to RFP18 here?**
  - o You stated that you plan to produce agreements with MVPDs and direct licensees, in response to other RFPs, and asked what other agreements this request aims to capture.
  - o With the clarification that we are seeking these two forms of agreements related to trial programs as well as full-scale roll-outs of your service, SoundExchange accepts that compromise.
- **RFP 22 (Financial Analyses)**
  - o If you will produce documents responsive to our proposed compromises for RFPs 14, 15, and 16, the SoundExchange would accept no further production in response to this Request.

One last note. In conducting our own document review, it has come to SoundExchange's attention that we do not have the Restricted materials, including Music Choice's written testimony, oral and deposition transcripts, and exhibits, from either the *Web I* or *PSS I* proceedings. To the extent that the Restricted testimony or other materials would be responsive to any of SoundExchange's RFPs, please do not withhold that testimony on the theory that it is already within SoundExchange's possession, custody, and control.

Thank you,  
Andrew

---

**From:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>  
**Sent:** Thursday, March 18, 2021 8:43 PM  
**To:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**External Email – Exercise Caution**

Hi Andrew,

I'll be responding to the rest of your email under a separate cover. But regarding the RFPs we were not able to address on our last call, I'm glad to set up a continuation of that call. Tomorrow I am free from 10 AM -12 noon, and after 3 PM Eastern. Is there a time in there that works for you? If not, we can look at availability for next week.

**Margaret L. Wheeler-Frothingham**

*Associate*

*Pronouns: she/her*

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**From:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>  
**Sent:** Wednesday, March 17, 2021 4:37 PM  
**To:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**\*\*EXTERNAL SENDER\*\***

Hi Margaret,

I'm writing to memorialize what we agreed on during our meet and confer call last week, as well as to propose a narrowed scope for each parties' requests for all communications. Please let us know if you agree.

#### Privilege logs

- We agreed that we are at an impasse. Music Choice believes that privilege logs would not be appropriate, given the parties' agreements and actions in the underlying proceeding. SoundExchange needs some ability to evaluate the parties' claims of privilege, and does not view the decision not to exchange logs in the underlying proceeding binding on this new stage of the proceeding.

#### The term, Music Choice PSS Internet Services

- For discovery purposes, when referring to Music Choice PSS Internet Services, Music Choice's services, or other similar terms, the parties agreed that they are seeking and will produce documents about Music Choice's consumer audio service, however delivered to subscribers.

#### Timeframe of SoundExchange's Requests

- Music Choice made clear that their proposed limitation to documents from 1998, and 2018-present – which is based on relevance and burden grounds – only applies to the requests about the internet issue.
  - Music Choice is not proposing to limit the timeframe with regard to the audit issue.
  - Music Choice is not proposing any limitation on reliance on documents that were produced in discovery in the underlying proceeding, including documents outside of its proposed timeframe that describe the features of its service.
  - Music Choice further clarified that, under its proposal, it would consider responsive an agreement or other similar document about a service that was in effect in 1998 or 2018-present, even if the agreement was signed or came into effect in a prior year.
- SoundExchange proposed a compromise timeframe of (1) 1996-2000, (2) 2018-present, and (3) a limited subset of documents in the interim period for some of the requests that relate to major aspects of Music Choice's service, such as documents relating to the introduction of major features of Music Choice's internet service.
- Music Choice will circle back on this. Please let us know.

#### Communications RFPs

- The parties agreed that they would be amenable to each party producing in response to narrowed requests for their respective RFPs for communications that more closely tailored to the issues on remand. The parties agreed to discuss a compromise proposal via email.
- SoundExchange believes its request for communications related to the audit issue is covered in the discussion of audit documents below. As to the internet issue, at a minimum, SoundExchange believes the production should encompass non-privileged communications related to:
  - The eligibility or ineligibility of Music Choice's PSS Internet Service for the grandfathered PSS rate,
  - Music Choice's PSS Internet Service as it existed in 1998
  - Music Choice's development and expansion of its Internet service. (As discussed on the call, we are not seeking emails about the minutia of every change to the programming or other details of the service. Rather, we are seeking communications that evince which partners offered Music Choice's consumer audio service, how many subscribers accessed such service, and any significant changes to the delivery of the service.)
- Is Music Choice amenable to this compromise?

#### Music Choice RFPs to SoundExchange

- RFP 3 – SoundExchange explained their burden objections and made clear that while it is not conducting a separate search for these documents, SoundExchange believes it knows when it first became aware of Music

Choice's Internet PSS and will be producing documents showing this, as those documents are responsive to other requests.

- Music Choice explained that it was not clear if SoundExchange intended to limit its searches or withhold documents based on its objections, for requests where it stated it would produce subject to its objections. SoundExchange explained it would not produce privileged documents or duplicative documents, and that we would be happy to answer questions or concerns from Music Choice about specific objections. Please let us know if there are specific RFPs for which you would like further clarification.

#### SoundExchange RFPs to Music Choice

- Audit documents – SoundExchange explained its view that final reports and engagement letters may not provide sufficient information, as SoundExchange is seeking information regarding the scope of the audits as well as how they were conducted (e.g., what information was made available to the auditors, did the scope of the audit change or evolve, did the auditors follow certain accounting principles, etc.). Music Choice believes that much of this information is likely to be reflected in the final reports and engagement letters, but could not confirm. SoundExchange maintains that it is entitled to audit-related documents, including communications with the auditors, that reflect the scope and conduct of the auditors. Music Choice said they would take it under advisement. Please let us know if your position on this limitation has changed.
- RFPs 5 and 6: Music Choice explained its concerns about the burden of giving all documents in response to these requests instead of documents sufficient or representative documents. It explained that it would produce any documents showing what its internet service was like in 1998, including documents describing consumer-facing features and major technological changes, but not detailed backend technical specifications. Music Choice agreed to follow up in writing to explain the burden of producing all responsive documents.
- Additional RFPs: We ran out of time before we got to the following additional RFPs: 9-10 (usage data), 13 (PSS eligibility), 14 (allocation of costs), 18-19 (direct licenses / agreements), 22 (financial analyses / royalty calculations). The parties agreed to continue conferring on these issues. Would you like to schedule another call to discuss? We are open to discussing over email instead, but a call might be more efficient given the number of outstanding issues.

Thanks,  
Andrew

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**From:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>  
**Sent:** Monday, March 8, 2021 3:23 PM  
**To:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

External Email – Exercise Caution

Hi Andrew,

Would Thursday at 11 AM work for a meet and confer to discuss all of the above? We will also circulate some high-level notes on our concerns regarding SoundExchange's objections and responses.

**Margaret L. Wheeler-Frothingham**

Associate

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**From:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>  
**Sent:** Monday, March 8, 2021 12:57 PM  
**To:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**\*\*EXTERNAL SENDER\*\***

Hi Margaret,

Thank you for your email. SoundExchange cannot agree to forego the exchange of privilege logs. Nor do we agree that the decisions of participants about the necessity of such logs in the underlying rate-setting proceeding is binding on this new remand discovery period. While we are open to conferring about reasonable limitations on the exchange of privilege logs, we must insist on a process by which we can meaningfully evaluate any claims of privilege that Music Choice might make.

We suggest discussing this issue as well as Music Choice's responses and objections to SoundExchange's document requests later this week. We are available to meet and confer on Thursday 3/11 from 10-12 EST, or Friday 3/12 from 2-5 EST. Please let us know if a time within one of those ranges would work for you.

In advance of that call, we will circulate an email highlighting the objections that we wish to discuss.

Thank you,  
Andrew

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**From:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>  
**Sent:** Friday, March 5, 2021 1:51 PM  
**To:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** RE: SDARS III Remand Discovery Protocol [MB-AME.FID3380375]

**External Email – Exercise Caution**

Hi Andrew,

Thanks for sending this. Overall, it looks fine to us, with one exception. Music Choice cannot agree to the new privilege log requirement in Section II. Neither side produced privilege logs during the original proceeding. It does not make sense to suddenly change that practice on remand. And, given the asymmetry in the expected volume of each side's document review and production due to the limited scope of the remand, Music Choice would be disproportionately impacted by the addition of such a new requirement on remand. We would prefer to continue with the practice the parties agreed to during the original proceeding, which did not require the logging of privileged materials.

If that Section II is removed, we are fine to move forward with the remainder of the proposed stipulation.

**Margaret L. Wheeler-Frothingham**

*Associate*

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**From:** Cherry, Andrew B. <[ACHerry@jenner.com](mailto:ACHerry@jenner.com)>  
**Sent:** Wednesday, March 3, 2021 11:18 PM  
**To:** Wheeler-Frothingham, Margaret <[MWheelerFrothingham@mayerbrown.com](mailto:MWheelerFrothingham@mayerbrown.com)>; Fakler, Paul <[PFakler@mayerbrown.com](mailto:PFakler@mayerbrown.com)>  
**Cc:** Chapuis, Emily L. <[EChapuis@jenner.com](mailto:EChapuis@jenner.com)>  
**Subject:** SDARS III Remand Discovery Protocol

**\*\*EXTERNAL SENDER\*\***

Hi Margaret,

Please find attached our proposed draft of the discovery protocol. As mentioned in my prior email, we also included language incorporating our agreement re the prior protective order.

Please let us know your thoughts/comments/revisions.

Thanks,  
Andrew

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## Andrew B. Cherry

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# Proof of Delivery

I hereby certify that on Monday, May 17, 2021, I provided a true and correct copy of the DECLARATION OF MARGARET L. WHEELER-FROTHINGHAM to the following:

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Johnson, George, represented by George D Johnson, served via ESERVICE at [george@georgejohnson.com](mailto:george@georgejohnson.com)

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Sirius XM, represented by Todd Larson, served via ESERVICE at [todd.larson@weil.com](mailto:todd.larson@weil.com)

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

SoundExchange, Inc., represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at [senglund@jenner.com](mailto:senglund@jenner.com)

Signed: /s/ Paul Fakler